LIBRARY
SUPREME COURT, U. S.
Office Supreme Court, U.S.
FILED
FEB 20 19
JOHN A. DAVIS, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 648

J. B. BEARD, *Appellant*,

v.

ELVIS J. STAHR, JR., Secretary of the Army; STEPHEN AILES, Under Secretary of the Army; and Major General JOE C. LAMBERT, The Adjutant General of the Army

Appeal from the United States District Court for the District of Columbia

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,
Counsel for the Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Cases: Page

Bailey v. *Richardson*, 182 F. 2d 46, affirmed, 341 U.S. 918 7
Bank of Augusta v. *Earle*, 13 Pet. 519 4
Blake v. *United States*, 103 U.S. 227 3
Bland v. *Connally*, 293 F. 2d 852 ..... 5, 6, 9, 10
Brown v. *Lane*, 232 U.S. 598 7
Cafeteria Workers v. *McElroy*, 367 U.S. 886 ..... 4, 7
Clackum v. *United States*, 296 F. 2d 226 ..... 5, 7
Cole v. *Young*, 351 U.S. 536 8
Creary v. *Weeks*, 259 U.S. 326 3
Crenshaw v. *United States*, 134 U.S. 99 3
Davis v. *Stahr*, 293 F. 2d 860 ..... 5, 6, 10
Eberlein v. *United States*, 257 U.S. 82 7
Fidelity & Deposit Co. v. *Tafoya*, 270 U.S. 426 4
French v. *Weeks*, 259 U.S. 326 3
Greene v. *McElroy*, 360 U.S. 474 4
Harmon v. *Brucker*, 243 F. 2d 613 9
Harmon v. *Brucker*, 355 U.S. 579 9
Insurance Co. v. *Morse*, 20 Wall. 445 4
Ives v. *Franke*, 271 F. 2d 469 3
Keim v. *United States*, 177 U.S. 290 7
Kwong Hai Chew v. *Rogers*, 257 F. 2d 606 2
McElrath v. *United States*, 102 U.S. 426 3
Payson v. *Franke*, 282 F. 2d 851, certiorari denied *sub nom. Robinson* v. *Franke*, 365 U.S. 815 3
Peters v. *Hobby*, 349 U.S. 331 8
Reaves v. *Ainsworth*, 219 U.S. 296 3
Rogers v. *United States*, 270 U.S. 154 3
Schware v. *Board of Bar Examiners*, 353 U.S. 232 .. 4
Service v. *Dulles*, 354 U.S. 363 8
Speiser v. *Randall*, 357 U.S. 513 ..... 2, 4
Terral v. *Burke Construction Co.*, 257 U.S. 529 4
United States v. *Pink*, 315 U.S. 203 8
Vitarelli v. *Seaton*, 359 U.S. 535 8
Wallace v. *United States*, 257 U.S. 541, rehearing denied, 258 U.S. 296 3
Western Union Tel. Co. v. *Kansas*, 216 U.S. 1 4
Williams v. *Zuckert*, 296 F. 2d 416 7
Wood v. *Hoy*, 266 F. 2d 825 2

STATUTES: Page

National Defense Act, § 24b (10 U.S.C. [1926-1946 eds.] § 571) 3

United States Code:

5 U.S.C. § 652(a) 7
10 U.S.C. §§ 3781-3791 (chap. 359) 10
10 U.S.C. § 3786(a)(2) 10
10 U.S.C. §§ 3791-3797 (chap. 360) 1, 10
10 U.S.C. § 3792 3
10 U.S.C. § 3795 3
10 U.S.C. § 3796(a)(2) 10

MISCELLANEOUS:

H. R. Rep., 86th Cong., 2d sess., pp. 13, 14 10

Report of Major General C. L. Decker, Department of the Army Pamphlet No. 27-101-87 6

Winthrop, *Military Law & Precedents* (2d ed. 1896):

*1102-1118; pp. 710-720 reprint 8
*1106; reprint, p. 713 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 648

J. B. BEARD, *Appellant*,

v.

ELVIS J. STAHR, JR., Secretary of the Army; STEPHEN AILES, Under Secretary of the Army; and Major General JOE C. LAMBERT, The Adjutant General of the Army

---

Appeal from the United States District Court for the District of Columbia

---

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

Pursuant to Rule 16(3), appellant files this brief in opposition to the Motion to Affirm, hereinafter "M/A."

First. One of the two grounds on which the statute now in question, 10 U.S.C. §§ 3791-3797, was challenged as repugnant to the Constitution, in the District Court (Cmplt., ¶16½; J.S. App. A1, A16) and here (Questions

2 and 4, J.S. 2-3; J.S. 6-7, 16-19), was that it shifted to the officer accused of misconduct the burden of disproving the allegations made against him—not, as misstated in the Motion to Affirm (M/A 6), "that he had to show cause that he was qualified to hold his office." Appellant has never objected to the burden of going forward, but only to the shift in the burden of proof.

The court below (J.S. App. A16) held that it was proper to shift the burden of proof in the case of a citizen—this appellant—while two circuits have held a similar shift improper in cases of aliens resisting deportation (*Kwong Hai Chew* v. *Rogers*, 257 F. 2d 606 (D.C. Cir.); *Wood* v. *Hoy*, 266 F. 2d 825 (C.A. 9)), and this Court has held a like shift in the burden of proof to be a violation of due process where only a tax exemption was in issue (*Speiser* v. *Randall*, 357 U.S. 513, 525-526).[1]

The resolution of that diversity of judicial decision assuredly calls for decision here. Yet in 12 pages of printed argument (M/A 8-19) the Motion to Affirm makes only two glancing references to the shift in the burden of proof (M/A 16, 19).

No doubt it is possible to downgrade the substantiality of an appeal by ignoring half of the questions it presents. But such a technique fails to present a summary that is accurate—or in any sense fair.

Second. With respect to the other ground of asserted unconstitutionality, failure to provide for confrontation and cross-examination in a case of elimination for misconduct (Cmplt., ¶¶ 14, 15; J.S. App. A2, A16-A17; Ques-

---

[1] "Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt." *Id.* at 526. Why should utter loss of livelihood and reputation be subject to less protection?

tion 3, J.S. 3; J.S. 14-16, 19-20), it is important to bear in mind what is not involved in this case.

The present case does not concern the power of the President to remove an officer summarily, such as was involved in *McElrath* v. *United States*, 102 U.S. 426, and in *Wallace* v. *United States*, 257 U.S. 541, rehearing denied, 258 U.S. 296, and was discussed (though not involved) in *Blake* v. *United States*, 103 U.S. 227. Similarly, the present case concerns neither the power pursuant to appropriate legislation to reduce the strength of the armed forces (*Crenshaw* v. *United States*, 134 U.S. 99), nor the procedures to be followed in the case of examinations for promotion (*Reaves* v. *Ainsworth*, 219 U.S. 296), nor the procedure for passing over for promotion officers deemed less efficient than their fellows (*Payson* v. *Franke*, 282 F. 2d 851 (D.C. Cir.), certiorari denied *sub nom. Robinson* v. *Franke*, 365 U.S. 815), nor the type of discharge proper for non-proficient enlisted personnel (*Ives* v. *Franke*, 271 F. 2d 469 (D.C. Cir.)).

Nor does this case involve the issue, reiterated in the Motion to Dismiss (M/A 9-13, 17-18), whether an officer facing elimination is entitled to a trial-type hearing; that latter issue has already been determined, and in the affirmative. For Congress provided a trial-type hearing in 10 U.S.C. §§ 3792 and 3795, just *as* it provided trial-type hearings in Section 24b of the National Defense Act (10 U.S.C. [1926-1940 eds.] § 571), which was under consideration in *French* v. *Weeks*, 259 U.S. 326; *Creary* v. *Weeks*, 259 U.S. 336; and *Rogers* v. *United States*, 270 U.S. 154.

Rather, the gravamen of the present complaint is that, in shackling the present trial-type hearing (10 U.S.C. §§ 3792, 3795) by the shift in the burden of proof and by the failure of any means to insure confrontation and cross-examination, the resultant procedure so far transforms accusation into proof as to fall below the minimal require-

ments of due process of law. None of this Court's decisions cited in the Motion to Affirm holds such a procedure proper, either directly or by fair implication; while *Greene* v. *McElroy*, 360 U.S. 474, 496-497, and *Speiser* v. *Randall*, 357 U.S. 513, 525-526, strongly support the present appellant. Nor is *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, opposed to appellant's position, since there (pp. 895-896) the employee suffered no loss of livelihood, which is not the situation here.

A familiar analogy gives this appellant further support. Thus, while a State may exclude a foreign corporation entirely (*Bank of Augusta* v. *Earle*, 13 Pet. 519), a State may not exclude such a corporation except on condition that it agree not to remove cases to the Federal courts (*Insurance Co.* v. *Morse*, 20 Wall. 445), nor on condition that it pay taxes otherwise improper (*Western Union Tel. Co.* v. *Kansas*, 216 U.S. 1). Neither can a State revoke its earlier permission when the corporation removes suits brought against it (*Terral* v. *Burke Construction Co.*, 257 U.S. 529), nor when the corporation pays commissions to non-residents in respect of resident business (*Fidelity & Deposit Co.* v. *Tafoya*, 270 U.S. 426).

So here: The Congress may permit the President to dismiss an officer summarily. But it cannot confer on the Secretary of the Army power to dismiss an officer after a hearing that is not consonant with due process of law, any more than a State may withhold admission to the bar on grounds that offend due process (*Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238-239), or deny a tax exemption otherwise available where the denial follows a procedure violative of due process (*Speiser* v. *Randall*, 357 U.S. 513, 525-526).

Significantly enough, the Motion to Affirm makes no effort to support the holding of the Court below (J.S. App. A14) that "such statutory restrictions and adminis-

trative procedure as may be imposed or created by Congress, are not subject to the limitations of the Bill of Rights or any other constitutional provisions." Yet that view is at the core of the decision which according to the Motion to Affirm involves no substantial question, and in respect of which that Motion seeks summary affirmance.

It is not necessary to extend the discussion. The issue is plainly an important one that should be fully developed before this Court.

Third. The District of Columbia Circuit has held that confrontation and cross-examination are prerequisites to any separation with a discharge less than honorable (*Bland* v. *Connally*, 293 F. 2d 852; *Davis* v. *Stahr*, 293 F. 2d 880), while the Court of Claims has struck down as ineffective an effort to separate an enlisted woman for misconduct through procedures not affording the safeguards of a trial. *Clackum* v. *United States*, 296 F. 2d 226, discussed at J.S. 20.

The Motion to Affirm, characteristically, does not mention the *Clackum* case, and attempts (M.A. 15-16) to distinguish *Bland* and *Davis* on three grounds, viz., that no constitutional issue was discussed, that the cases were limited to issues affecting loyalty, and that they involved only inactive reservists. Even a careful rereading of the opinions fails to support those distinctions. Constitutional issues were discussed at length in connection with the proper interpretation of the statutes involved; the holdings were general, applying to all discharges less than honorable; and the fact that inactive reservists were involved makes the present an *a fortiori* case, as has already been argued (J.S. 15-16). Indeed, in announcing the Government's failure to seek certiorari in the *Bland* and *Davis* cases, the Army through two of the present appellees has

indicated that in its view those decisions may be applicable to the proceedings of all administrative discharge cases.[2]

Accordingly, for the reasons already set forth (J.S. 15-16), and without further elaboration now, it is plainly important that this Court clarify the obvious contradictions between the *Bland* and *Davis* cases on the one hand, and the ruling of the court below on the other.

In this connection, it is suggested that the statement (M.A. 8), "conduct, while perhaps not sufficient to justify a court-martial for a specific offense, provides good reason to doubt that he is professionally or morally suitable,"

---

[2] See Department of the Army Pamphlet No. 27-161-87, 3 Jan. 1962, *Report of Major General C. L. Decker* [The Judge Advocate of the Army]. This pamphlet was issued By Order of the Secretary of the Army (i.e., the appellee Stahr), and was authenticated by The Adjutant General of the Army, the appellee Lambert. The passage concerning the *Bland* and *Davis* cases, at p. 5, is as follows:

> "The substance of the Court of Appeals decisions in these two cases is that an inactive reservist cannot be given a less than honorable discharge for security reasons by the use of classified evidence. However, the Court of Appeals in arriving at this decision made sweeping statements as to the respondent's right to certain trial-like due process before military boards. Although the broad wording of the decisions would appear to attack the legality of a discharge less than honorable recommended by any administrative board which did not apply trial-like due process, the Solicitor General declined to apply to the Supreme Court for certiorari in both cases. He advised the military services to confine the applicability of the decisions to only those cases concerning discharges of inactive reservists for security reasons. Although this office and the Department of Justice are prepared to defend and appeal, if necessary, any other type of administrative discharge case, in an effort to clarify or modify the *Bland* and *Davis* cases, until that is done, all staff judge advocates are advised to utilize as many live witnesses as possible, rather than depend on proof by affidavit in cases before administrative boards."

is little more than an unconvincing euphemism for the proposition, frankly admitted at the legislative hearings (J.S. 19-20), that, where the evidence is insufficient to convict before a court-martial, under traditional safeguards and in a judicial atmosphere, then the same result can be achieved under the present statute, where the board does not see the accusers, where the accused cannot cross-examine them, and where the burden of proof is on the accused to prove his innocence. The *Clackum* case calls such a subterfuge illegal—and the Motion to Affirm does not mention *Clackum*.

Fourth. The analogy between officers of the Regular Army, commissioned by and with the advice and consent of the Senate, and civilian employees appointed only by the heads of Departments, an analogy much stressed in the Motion to Affirm (M. A. 13-15), is not persuasive. The decisions relied upon either involve summary removals (*Brown* v. *Lane*, 232 U.S. 598), discharges purely for inefficiency (*Keim* v. *United States*, 177 U.S. 290), or situations where either the employee had no right to a hearing—i.e., was subject to summary dismissal (5 U.S.C. § 652(a))—or else had a full hearing, as in *Eberlein* v. *United States*, 257 U.S. 82, 84 ("There can be no question from the findings in this case that the plaintiff had the benefit of a hearing according to the regulations then in force.") The decisions cited, therefore, cannot be controlling here.

Cafeteria Workers v. *McElroy*, 367 U.S. 886, plainly is not in point, since there no loss of livelihood was involved, the precise opposite of the present case; in *Williams* v. *Zuckert*, 296 F. 2d 416, 417 (D.C. Cir.), the employee "failed to use available administrative means to arrange for the appearance of witnesses," whereas here no such means were at hand; while the other decisions relied upon appear to reflect the influence of *Bailey* v. *Richardson*, 182

F. 2d 46 (D.C. Cir.). It seems sufficient to remark that the subsequent affirmance of that ruling by an equally divided Court (341 U.S. 918) not only prevents it from being a precedent (e.g., *United States* v. *Pink*, 315 U.S. 203, 216), but that later decisions here have substantially undermined even the persuasive value of its approach. *Peters* v. *Hobby*, 349 U.S. 331; *Cole* v. *Young*, 351 U.S. 536; *Service* v. *Dulles*, 354 U.S. 363; *Vitarelli* v. *Seaton*, 359 U.S. 535.

In any event, no decision up to now has suggested that the rights of commissioned officers of the Regular Army to their offices and to the emoluments and retirement rights thereunto appertaining are properly to be equated with the rights of civilian employees neither appointed by the President nor confirmed by the Senate.

Fifth. It is said (M.A. 16) that "The purpose of the statute is not to try and punish the individual officer" and that (M.A. 18) "While such a requirement [i.e., of cross-examination] can be properly imposed in a court-martial proceeding *where penalties are imposed*, Congress can properly consider it inappropriate and unwarranted in a proceeding merely separating an officer from the military establishment." [Italics added.]

The suggestion that the present proceeding, wherein an officer is charged with "conduct unbecoming an officer" (J.S. App. A5), traditionally one of the most stigmatizing of military offenses (J.S. 19; Winthrop, *Military Law & Precedents* (2d ed. 1896) *1102-1118; pp. 710-720, 1920 reprint), in consequence of which he stands to be separated from the service with a discharge less than honorable (J.S. App. A7, A8) and with the loss of an annuity whose net value is in excess of $90,000 (J.S. 11)—the suggestion that such a proceeding is not punitive and does not involve penalties involves characterizations so distorting that they all but trifle with the truth.

The District of Columbia Circuit said only last year, in one of the cases that the Government declined to bring here for review (*Bland* v. *Connally*, 293 F. 2d 852, 858):

> "We think it must be conceded that any discharge characterized as less than honorable will result in serious injury. It not only means the loss of numerous benefits in both the federal and state systems, but it also results in an unmistakable social stigma which greatly limits the opportunities for both public and private civilian employment."

Previously Government counsel had conceded as much, not only in the District of Columbia Circuit but also in this Court.[3]

We are dealing with substance, not labels. These present proceedings seek to, and unless restrained by this Court will, separate appellant from the service under an accusation (Winthrop, *supra*, p. *1106; reprint, p. 713) that "seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms," with a consequent loss of livelihood and of valuable retirement rights, and under "an unmistakable social stigma which greatly limits the opportunities for both public and private civilian employment." *Bland* v. *Connally*, quoted just immediately above.

[3] "The portion of our population holding honorable discharge certificates from the armed services is now so great that an adverse reflection is inherent in a certificate which is other than 'honorable.' This is, of course, confirmed by the statement of appellee's counsel in oral argument that '. . . every soldier gets an honorable discharge unless there is some blemish on his record on account of which he receives a discharge other than honorable.'" *Harmon* v. *Brucker*, 243 F. 2d 613, 625 (D.C. Cir.)

"It may well be that a General or Undesirable Discharge Certificate shown to a potential employer, whether in the Government or elsewhere, might dispose him against hiring an applicant who has been so discharged." Brief for the Respondent, p. 62, in *Harmon et al.* v. *Brucker*, Nos. 80 and 141, Oct. T. 1957.

That is why the *Bland* and *Davis* cases were phrased in general terms. That is why, in any proceeding seeking to terminate any kind of military commission under conditions less than honorable, the officer concerned when not subject to summary dismissal is entitled to a hearing at which he can cross-examine and be confronted by his accuser—not his "superior officer, charged with supervision and evaluation of his work," as M A 18 states, without the slightest support from the present record—and at which the burden of proving the allegations of misconduct rests on those who make them.

The Motion to Affirm makes a further demonstrable misstatement in saying (M A 17) that "In all such cases [i.e., "officers charged with substandard performance of duty * * *, unsuitability * * *, or failure to perform their duty"], the officers would suffer the same injuries as appellant, *i.e.*, loss of position and retirement benefits, and the possibility that the proceeding may be the basis for a less than honorable discharge."

The statutes involved completely disapprove that statement. Where an officer is separated under Chapter 359—10 U.S.C. §§ 3781-3787—for "Substandard Performance of Duty," he receives, if not then eligible for retirement, a mandatory honorable discharge. 10 U.S.C. § 3786(a)(2). But where he is separated under Chapter 360—10 U.S.C. §§ 3791-3797, the provisions involved and challenged here—for "Moral or Professional Dereliction or in Interests of National Security," then, if he cannot retire, the law provides simply for "discharge." 10 U.S.C. § 3796(a)(2). One carries a stigma, the other does not; and the Committee Report shows that this distinction was deliberately made. H. R. Rep. 1406, 86th Cong., 2d sess., pp. 13, 14. Thus the Motion to Affirm quite misses the thrust of the *Bland* and *Davis* cases, both of which deal with discharges less than honorable for causes involving lack of integrity rather than lack of efficiency.

Thus, here again, the present case raises substantial questions that require plenary consideration for their resolution.

Sixth. If the Court notes probable jurisdiction, then, in order to preserve that jurisdiction, it should restrain the appellees from discharging the appellant pending issuance of the final judgment herein. A stay seeking such relief has been duly presented to the Circuit Justice (see J.S. 12). The granting of that stay would become a necessity if this case were set for argument, in view of appellees' threat to render the controversy moot; see the letter from the Solicitor General to the Clerk dated January 2, 1962, in which he said:

> "The Government reserves its right to discharge Colonel Beard after the end of seven days following this Court's action on the motion to affirm—in whatever way the Court may act on the motion—or after the end of seven days following the end of the present term if the Court has not yet acted."

A stay pending final disposition of this cause is therefore essential to preserve this Court's jurisdiction—because, obviously, the present action to enjoin appellant's elimination would be rendered moot by his discharge, and this would be so even if he could be thereafter restored, which, of course he cannot be. See J.S. 22 and authorities there cited.

Meanwhile appellant has authorized the statement that he will not render the present cause moot by any voluntary act of his own as long as it remains under consideration by this Court.

CONCLUSION

For the foregoing additional reasons, the Court should note probable jurisdiction of this appeal, at the same time staying appellees from discharging the appellant from the Army pending the issuance of the final judgment in this cause.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,

Counsel for the Appellant.

FEBRUARY 1962.